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IN THE

Supreme Court of the United States

October Term, 1972

No. 73—246

IN THE MATTER OF FAIRFIELD PRODUCTS, INC., a corporation, BANKRUPT,

Respondent,

vs.

JOHN MAKENS and RAY MAKENS and MARY MAKENS, ADMINISTRATORS of ESTATE of JAMES MAKENS, DECEASED, APPELLANTS and AGGRIEVED PARTIES,

Petitioners and Appellants.

REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioning creditors and also Fairfield Products, Inc., a corporation, bankrupt respectfully submits its brief in opposition to the Petition for Writ of Certiorari by the above named Petitioners and Appellants.

HISTORY

An Involuntary Bankruptcy Petition was filed against Fairfield Products, Inc., a corporation. Thereafter Attorney John M. Giltinon, representing himself as attorney and agent for the alleged Bankrupt, filed an Answer "neither admitting nor denying" the Creditors' Petition but asking for a jury trial. Immediately thereafter Fairfield, acting through the majority of the directors, filed a Consent to Bankruptcy. District Judge Nichol routinely entered an adjudication of Bankruptcy and referred the matter to the Referee. Thereafter a Motion to Vacate said Order of Adjudication in Bankruptcy was filed by Attorney Giltinon, again representing himself as attorney and agent of Fairfield. Testimony was taken at the hearing on said Motion and Judge Nichol determined that Attorney John M. Giltinon had no authority to appear on behalf of Fairfield Products, Inc. at any time, which included the Answer to the Creditors' Petition and Request for Jury Trial, and also the Petition and Motion to Vacate Order of Adjudication of Bankruptcy. At the hearing when questioned by the Court, Attorney Giltinon admitted the same. The Motion to Vacate Order of Adjudication was denied, affirming the adjudication of Bankruptcy.

Next Attorney John M. Giltinon, representing himself as attorney for Appellants, had "John Makens, Ray Makens and Mary Makens, Administrators of the Estate of James Makens, deceased" sign a Notice of Appeal to the Eighth Circuit Court of Appeals, again referring to himself as attorney of record for Fairfield, and referring to himself as representing the aforesaid aggrieved parties. Similarly he also filed a Motion for a Stay Order or Supersedeasas on behalf of Fairfield Products, Inc. with himself as attorney for aggrieved parties. The Eighth Circuit Court of Appeals after a Hearing dismissed the Appeal stating that the record was clear that Mr. Giltinon had not been authorized to represent

Fairfield by its board of directors, that the majority of Fairfield directors had voted to authorize the Admission and Confession of Bankruptcy, and concluded that Judge Nichol was correct in making his Order of Adjudication of Bankruptcy and in declining to vacate that Order. The Court of Appeals further stated a minority of directors holding a minority of outstanding stock does not have the right to file pleadings on behalf of the corporation and the attempt to do so by Mr. Giltinon on behalf of his clients is at best, questionable practice. Since the Appeal was not brought by any duly authorized representative of Fairfield, Mr. Giltinon and his clients have no standing to question the Orders of Judge Nichol in this case.

CERTIORARI SHOULD BE DENIED

No matter or ground exists for the review of this cause on Certiorari. The Eighth U. S. Court of Appeals has made no decision in conflict with another court, state or federal. There has been no departure by the lower district court or the Eighth Circuit Court from any accepted and usual course of judicial proceedings. The only departure from usual judicial proceedings were at the instance of Attorney John M. Giltinon as follows:

1. The filing by attorney John M. Giltinon of an Answer to Creditors' Petition for Fairfield's adjudication as a Bankrupt, wherein he represented himself as attorney and agent of Fairfield, which was an unauthorized act by his own admission to the District Court that he did not represent Fairfield.

2. The Petition filed by Attorney John M. Giltinon on behalf of Fairfield Products, Inc. as their duly authorized attorney and agent to vacate the Order of Adjudication was without authority, again this was an unauthorized act by Giltinon's own admission in open court.

3. The filing of this Petition for Writ of Certiorari under the above heading and the various pleadings under other headings is evidence of the questionable practice of the numerous delaying tactics and bad faith of Petitioners and is indicative of the basic desire to delay and impede the orderly administration of this Bankruptcy Estate without any showing of any merit for same.

4. The right of trial by jury in bankruptcy proceedings is a "statutory right", once it is requested by the "debtor". However, debtor Fairfield Products, Inc. acting through their board of directors consented to the adjudication of bankruptcy. Further the cases cited in no way support the Petitioners' position that the right to a trial by jury in a Bankruptcy is protected by the Seventh Amendment to the United States Constitution.

5. Minority stockholders may not answer an Involuntary Petition in Bankruptcy representing themselves as the "debtor". The *Porterfield vs. Gerstel*, 222 F2d 137, does not support petitioners. It is authority for the District Court, in its discretion, to permit intervention by stockholders *where said stockholders in their own name appear and make a showing that their petition for intervention should be approved.* The Petitioners for the subject Writ of Certiorari never appeared of record in opposition to the creditors' petition for involuntary bankruptcy or in the Petition to Vacate the Order of Adjudication of Fairfield Products, Inc. as a bankrupt.

6. With reference to "Questions Presented" set out in the Petition for Writ of Certiorari where it is mentioned Joe W. Cadwell was attorney for petitioning creditors and also counsel for Fairfield Products, Inc., a corporation, Bankrupt. No conflict of interest existed. Cadwell represented only the petitioning creditors until after the consent to bankruptcy

was filed by the corporation and so adjudicated. Thereafter all wanted the orderly administration of the bankruptcy estate and thereafter bankrupt joined with petitioning creditors to expedite the administration of the bankruptcy estate including fighting all delaying tactics. The insolvency of Fairfield was self evident from the schedules and never questioned. Petitioners Makens' filed an objection to the sale to Midwest Foods, Inc. of the assets of the bankrupt for $1,000, and at the hearing on said objections, it was determined that in addition to the other secured creditors, the Small Business Administration had a blanket lien covering all the assets of the bankrupt substantially exceeding the value of said assets.

CONCLUSION

For these many reasons assigned, the Court is urged to deny the Writ of Certiorari.

Respectfully submitted,

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Signature of Counsel
Member of U. S. Supreme Court
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